

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CRAIG J. MERCER,)	
)	
Petitioner)	
)	
v.)	Docket No. 98-315-P-H
)	
WARDEN, CHILLICOTHE)	
CORRECTIONAL INSTITUTE,)	
)	
Respondent)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his sentencing in the Maine Superior Court (Cumberland County) after his plea of guilty to a charge of criminal threatening. The petition alleges as grounds for relief that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, that his plea was not knowing and voluntary, that the government denied him due process of law in the course of its prosecution of this offense, and that the state court erred in accepting his plea without first determining that there was sufficient evidence to prove the elements of the charge beyond a reasonable doubt. The respondent contends that the petitioner has failed to exhaust his post-conviction review remedies in state court, as required by 28 U.S.C. § 2254(b). I recommend that the petition be dismissed.

I. Background

On June 16, 1994 the petitioner was charged with criminal threatening, a violation of 17-A M.R.S.A. § 209 and a Class D crime. Criminal Complaint, *State v. Mercer*, Docket No. 94-5574, Maine District Court (Division of Southern Cumberland). After the matter was transferred to the Superior Court, the petitioner pleaded guilty to the charge on September 14, 1994. Judgment and Commitment, *State v. Mercer*, Docket No. CR 94-1246, Superior Court (Cumberland County), at 1. The petitioner was represented by counsel at the time of his plea. Transcript, Rule 11 & Sentence, *State v. Mercer*, Docket No. CR-94-1246, at 2. He was sentenced to a term of ten days in the county jail. Judgment and Commitment at 1.

On December 30, 1994 the petitioner filed a *pro se* pleading entitled “Motion to Vacate,” which the Superior Court treated as a petition for post-conviction review, docketed as *Mercer v. State*, Docket No. CR 95-76. Docket Sheet, *Mercer v. State*, Docket No. CR 95-76, Superior Court (Cumberland County). The petition was summarily dismissed by the court on March 11, 1995. Post-Conviction Assignment Order, *Mercer v. State*, Docket No. CR-95-76 (March 11, 1995) at 4. The petitioner appealed from the dismissal, and the Law Court vacated the dismissal and remanded for appointment of counsel and further proceedings. Order on Certificate of Probable Cause, *Mercer v. State*, Docket No. CUM-95-318, Supreme Judicial Court Sitting as the Law Court (Aug. 10, 1995). Appointed counsel for the petitioner were allowed to withdraw on February 23, 1996 (Endorsement, Motion to Withdraw [of Lisa J. Friedlander, Esq.], *Mercer v. State*, Docket No. CR-95-76 (Feb. 23, 1996) (“Friedlander Motion”)); and July 14, 1998 (Endorsement, Motion to Withdraw [of Anthony J. Sineni III, Esq.], *Mercer v. State*, Docket No. CR 95-76 (July 14, 1998) (“Sineni Motion”)). He has also been represented by Seth Berner, Esq. (Counsel’s Motion to

Withdraw, *Mercer v. State*, Docket No. CR 95-76 (Aug. 23, 1996) (“Berner Motion”)); J. P. DeGrinney, Esq. (Pre-Hearing Order Resulting from Conference, *Mercer v. State*, Docket No. CR-95-76 (July 29, 1997) at 1); and Kevin Heffernan, Esq. (Letter from Kevin Heffernan, Esq. to Craig J. Mercer dated September 27, 1998 (“Heffernan Letter”), Exh. A to Motion for Recusal (Docket No. 5)). The state case remains pending. Answer to Petition for Writ of Habeas Corpus (Docket No. 3) at 9; Motion for Recusal at 1.

II. Discussion

The respondent asserts that the petitioner has failed to exhaust the remedies available to him in state court, as required by 28 U.S.C. § 2254, and that this petition must therefore be dismissed. Section 2254(b)(1)(A) provides that an application for a writ of habeas corpus shall not be granted unless it appears that “the applicant has exhausted the remedies available in the courts of the State.” An applicant shall not be deemed to have exhausted the remedies available to him in state court if he has the right under state law to raise, “by any available procedure,” the question presented in the petition. 28 U.S.C. § 2254(c). “[A] federal court will ordinarily defer action on a cause properly within its jurisdiction until the courts of another sovereign with concurrent powers . . . have had an opportunity to pass upon the matter.” *Scarpa v. Dubois*, 38 F.3d 1, 6 (1st Cir. 1994) (finding this practice codified in section 2254).

To exhaust a federal constitutional claim, a prisoner must present its “substance” in state court before seeking a second opinion through habeas corpus in federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). “In this area of federal-state relations, the exhaustion principle is the disputatious sentry which patrols the pathways of comity. A habeas petitioner must have presented

both the factual and legal underpinnings of his claim to the state courts in order for us to find it exhausted.” *Nadworny v. Fair*, 872 F.2d 1093, 1096 (1st Cir. 1989) (citations omitted). The habeas petitioner “bears a heavy burden to show that he fairly and recognizably presented to the state courts the factual and legal bases of [his] federal claim.” *Adelson v. DiPaola*, 131 F.3d 259, 262 (1st Cir. 1997). All of the grounds asserted in the petition before this court are raised in the post-conviction review proceeding still pending in the Superior Court. Memorandum in Support of Motion to Vacate, *State v. Mercer*, Docket No. CR 95-76, Maine Superior Court (Cumberland County) (Dec. 18, 1994), at 1-24; Amended Petition, *Mercer v. State*, Docket No. Cr 95-76, Maine Superior Court (Cumberland County) (June 7, 1996), at 1.

Failure to exhaust is excusable under section 2254(b) if there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. State corrective process is clearly available in this case; the petitioner has invoked it. He argues, however, that the state process is ineffective, Traverse by Petitioner (Docket No. 11) at 25, due to the fact that the matter has been pending for three years since the remand from the Law Court, Petition (Docket No. 1) at 5. To be “ineffective” within the meaning of section 2254(b), the state corrective process must be “so clearly deficient as to render futile any effort to obtain relief.” *Gagne v. Fair*, 835 F.2d 6, 9 (1st Cir. 1987) (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981)). While the question has not been addressed by the First Circuit in a reported decision, some circuits have held that an “inordinate” delay in resolution of a state post-conviction proceeding will render that relief “ineffective” within the meaning of the exception to section 2254(b). *E.g.*, *Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994) (eleven years; burden shifts to state to demonstrate why exhaustion should still be required); *Jenkins v. Gramley*, 8 F.3d 505, 508

(7th Cir. 1993); *Workman v. Tate*, 957 F.2d 1339, 1344 (6th Cir. 1992) (three years). *See also Harris v. Champion*, 48 F.3d 1127, 1133 (10th Cir. 1995) (delay of over two years, for which state is responsible, in processing of direct appeal from conviction creates rebuttable presumption that state process is ineffective).

The mere passage of time is not sufficient, standing alone, to render state post-conviction relief ineffective, however. Delay that is attributable to the petitioner will not excuse the exhaustion requirement. *Wojtczak v. Fulcomer*, 800 F.2d 353, 354-55 (3d Cir. 1986). In *Workman*, the Sixth Circuit approved of an “inordinate delay” exception to the exhaustion requirement “especially where . . . the state clearly is responsible for the delay.” 957 F.2d at 1344. Here, the petitioner has been represented by at least five court-appointed lawyers in the state-court proceeding since the Law Court’s remand, two of whom have sought leave to withdraw at the direction of the petitioner, Friedlander Motion at 1; Sineni Motion at 1, and one of whom sought leave to withdraw due to the petitioner’s “expressed antagonism towards me,” Berner Motion at 1. His most recent counsel was apparently appointed after he filed the instant petition, about five months ago. Heffernan Letter at 1; Docket No. 1. Thus, much of the delay appears to be directly attributable to the petitioner. Even if the delays inherent in this continuing saga of replacement counsel could be construed to be due to the actions or inactions of the lawyers themselves, any errors of state-appointed counsel may not be attributed to the state because there is no constitutional right to counsel on collateral attack. *Sceifers v. Trigg*, 46 F.3d 701, 703 (7th Cir. 1995) (11-year delay).

While the length of the delay in the state-court proceedings in this case is troublesome, it cannot be said that the state is clearly responsible for that delay. In light of the First Circuit’s requirement that a deficiency in the state process render any effort to obtain relief “futile” before a

failure to exhaust state remedies may be excused, *Gagne*, 835 F.2d at 9, I can only conclude that the petitioner's failure to exhaust his state remedies in this case is not excusable due to the ineffectiveness of the available state procedures.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of February, 1999.

*David M. Cohen
United States Magistrate Judge*